

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NOS. 1568-1569 OF 2008

SEBASTIAN @ CHEVITHIYAN

....APPELLANT

VERSUS

STATE OF KERALA

....RESPONDENT

J U D G M E N T

HARJIT SINGH BEDI, J.

1. These appeals challenge the conviction of the appellant under Sections 302, 364, 369, 376(f), 392 and 449 of the Indian Penal Code and the award of the death sentence for the offence punishable under Section 302 of the I.P.C. and to various terms of imprisonment for the other offences. The facts are as follows :

2. On 1st August, 2005, PW1 was sleeping in the verandah of his house alongwith his son Saran, whereas his wife was sleeping inside the house alongwith their daughter Shemi, aged two years. As a matter of safety, PW-1 used to shut the door of the house from the outside. At about 4:00 a.m. on the

2nd August, 2005,

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PW-1 was told by his wife that Shemi was missing. The couple thereafter made a frantic search for the child in the vicinity and also called out loudly to her. Hearing the noise, the neighbours assembled and joined the search party. An hour later, the naked dead body of the child was found near the bridge across the AVM Canal and it was observed that two gold chains, one from the neck and the other from the waist, were missing. The dead body was brought to the house and the matter was reported to the police. An FIR Exhibit P-1 was accordingly recorded at about 7 a.m. in the Police Station. The police arrived in the village and made the necessary inquiries. The dead body was also sent for a post-mortem examination which was conducted by PW-9. The Post-mortem revealed that :

“Death was due to combined effects of drawing and blunt injuries sustained around nose and mouth. Injury Nos. 1 to 5 are on genital area. More injuries are possible by forcible sexual intercourse. Injury Nos. 6 to 9 are also possible by forcible sexual act. Injury Nos.10 to 13 can be caused by pressing the victim on the ground. Injury Nos.14 and 15 can be caused by coming into contact with hands with sufficient force. Injury Nos. 16 to 29 are in and around mouth and nose. It can be caused with hand with force.

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Injury

Nos.30 to 36

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can be caused by forcible contact of hand or contact with ground. The injury Nos.1 to 36 can be caused by forcibly taking the child and forcible sexual act and inter course and throwing the child in water as well as application of blunt force during these transactions. No poison was detected in the viscera and blood samples collected by the report obtained is marked as Ext.P4. It is also noted in the report that identical diatoms were detected from the water sample collected as well as in the bone marrow sample collected by me from the victim. It is also reported that human semen and spermatozoa detected in vaginal swab collected by me. That report is marked as Ext.P.5. There is evidence of penetration and emission of semen.”

3. The accused who was seen loitering close by was arrested and sent for a medical examination. PW-10, the Assistant Surgeon, certified that he was capable of committing the sexual act and also found one abrasion 1 cm. on the left side of the forehead, another abrasion on the left side of the chest and multiple abrasions on the left shoulder, the left forearm and on the back. The police also sent some of the articles which had been picked up from the place of incident including human hair, fibers of synthetic yarn and the frock which the child had been wearing to the laboratory for examination. Pursuant to a search of the appellant, two chains which were

identified as those

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worn by the child when she had been despoiled and murdered were recovered, in the presence of PW-13. The police also sent the swabs and smears taken from the child and her frock and from the clothes that the appellant had been wearing at the time of the incident, and the laboratory reported the presence of semen and spermatozoa in the vaginal swab of AB blood group on his underwear and trousers and further opined that the blood group of the appellant and the deceased child was AB (positive). The police also recorded the statements of PWs-5 and 6, the neighbours of the complainant who deposed that they had seen the appellant roaming around in the vicinity of the complainant's house on the previous day.

4. The Trial Court relying on the aforesaid evidence awarded the death sentence to the appellant. The Court observed that the appellant had trespassed into the complainant's house and taken the child away and had raped and then killed her. The recovery of the waist chain and the necklace that the deceased had been wearing when she had been taken away which had been handed over by the appellant to the police and

the recovery of the

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frock under a disclosure statement under Section 27 of the Evidence Act and the statements of PW5 and PW6, and the appellant's previous conviction in several such matters, were taken as sufficient evidence against him.

5. Mr. Harinder Mohan Singh, the learned counsel for the appellant has, at the outset, pointed out that the evidence of PW-5, PW-6 and PW-7 with regard to the appellant being in the vicinity of the house was uncertain and could not be relied upon and further that handing over of the jewellery witnessed by PW-13 and recovery of the frock from the appellant and duly witnessed by PW-12 had also not been proved.

The learned State counsel has, however, submitted that one of the very significant circumstances against the appellant was that he was a resident of a village about 40 Km. away from the place of incident and as his presence in the vicinity of the murder site had been admitted even by the defence, he was called upon to give some explanation as to what he was doing so far away from home. It has, further, been highlighted that PW-5, PW-6 and PW-7 who had seen him on the previous

morning moving

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around aimlessly had no animosity towards him and the fact that the appellant appeared to be a paedophile and had been involved in two similar instances earlier and had been convicted as well, was a matter of record and for this additional reason no interference in this matter was called for.

6. We have considered the arguments advanced by the learned counsel for the parties.

The evidence of PW-5 and PW-6 reveals that appellant had been seen around the complainant's house on the previous day and as he was not a resident of this area, he had been quickly singled out. These witnesses further stated the appellant had been seen in the vicinity again after the rape and murder and he had accordingly been apprehended and handed over to the police and two chains worn by deceased had been taken from his pockets. PW-13 also identified the chains in Court. It is true that in the cross-examination of these two witnesses, several improvements vis-à-vis their statements under section 161 of Cr.P.C. had been pointed out by the defence counsel, but the fact that the appellant had

been present in

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the vicinity of the house and had been arrested, soon after the incident has been admitted even by the defence.

7. Another significant piece of evidence is the statement of PW-7 who testified to the fact that about 2:30 a.m. on the night of the murder he had gone out of the house to urinate and had seen the appellant outside and on being questioned, the appellant had threatened him with dire consequences with the result that he had not informed anybody till the third day after the police had come to the village to verify the facts. He too stated to the fact that two chains had been recovered from the pocket of the appellant. It is true that several improvements have been made by the three primary witnesses but there is absolutely no reason as to why they would involve the appellant in a false case as admittedly he was a stranger to the locality and they bore him no ill will.

8. We have also gone through the evidence of PW-12 relating to the recovery of the frock pursuant to a disclosure statement made by the appellant under Section 27 of the Evidence Act. Nothing could be spelt out from the cross-

examination of

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this witness except that the recovery had not been made from a closed place, though he explained that there was very little movement of human beings in that area as no one was residing close by. This witness also identified the frock that had been recovered. It is equally significant that the strands of fibre recovered from the place of incident had been matched with the material of the frock and were found to be from the same source.

9. It is true that in a criminal matter the onus of proof lies almost exclusively on the prosecution. As already mentioned above, however, the appellant has not been able to give any explanation in his statement under section 313 of Cr.P.C. as to what he had been doing in that locality. On the contrary he admitted his presence by stating that he had been caught by the neighbours on suspicion of the murder and beaten up, and had suffered several injuries in the process. The medical evidence on the contrary reveals that these injuries could also have been sustained while raping and killing the young child.

10. The evidence

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that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Section 354 in the year 1998 and later for offences punishable under Sections 363, 376, 379, 302 and 201 of the IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Section 302, and several other terms of imprisonment with respect to the other sections, though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant, had, in addition, been tried for the murders of several other children but had been acquitted on the 28th July, 2005 with the benefit of doubt. The present incident happened three days later.

11. The learned counsel for the appellant has finally urged that the death sentence in the circumstances was not called for. He has pointed out that the case rested on circumstantial evidence and the death penalty should not ordinarily be awarded in such a case. It has further been emphasised that

the appellant was

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a young man 24 years of age at the time of the incident. We are of the opinion that in the background of these facts, that the death penalty ought to be converted to imprisonment for life but in terms laid down by this Court in **Swamy Shraddananda vs. State of Karnataka** (2008) 13 SCC 767 as his continuance as a member of an ordered society is uncalled for . We quote here-in-below the relevant observations :

“92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court’s option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 year and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years’ imprisonment and death. It needs

emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

95. In conclusion, we agree with the view taken by Sinha, J. We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High Court by imprisonment for life and direct that he shall not be released from prison till the rest of his life."

12. We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda's* case.

.....J.
(HARJIT SINGH BEDI)

.....J.
(J.M. PANCHAL)

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NEW DELHI,
OCTOBER 09,
2009